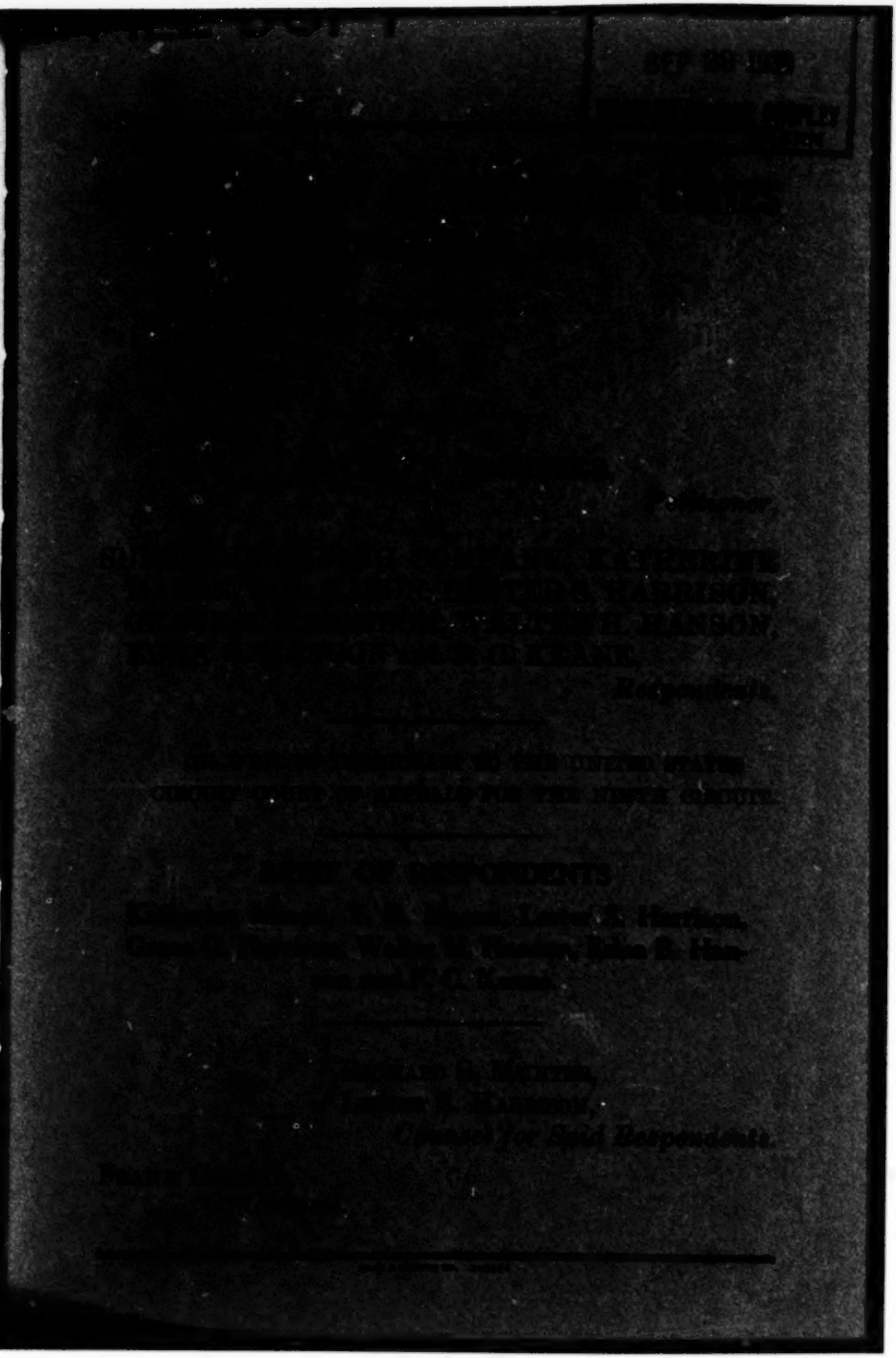

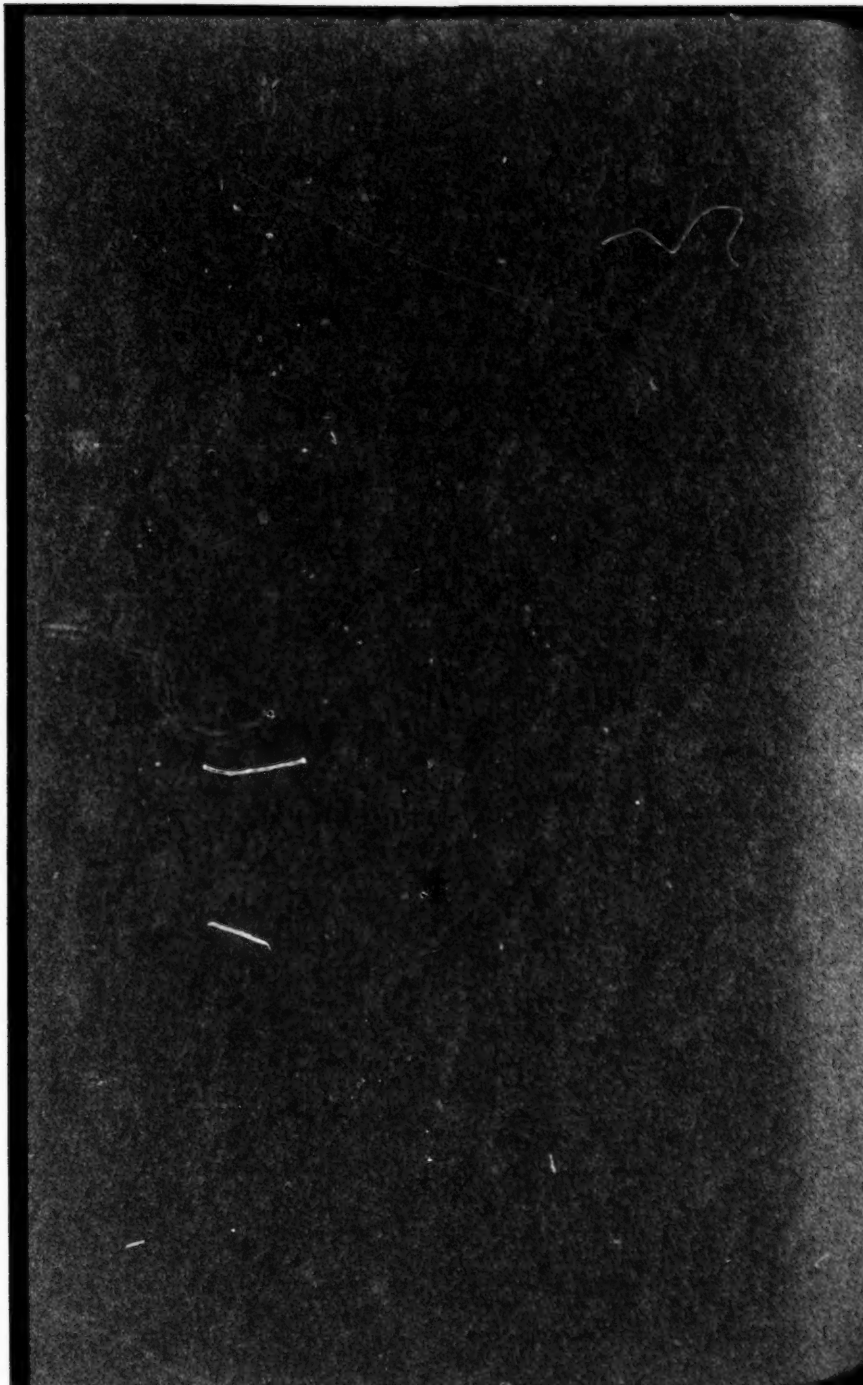

SUBJECT INDEX

TABLE OF CASES CITED IN BRIEF

TABLE OF CASES CITED IN BRIEF—*Cont.*

TABLE OF TEXT BOOK CITED IN BRIEF

TABLE OF STATUTES CITED IN BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 4

EVELYN TREINIES,

Petitioner,

vs.

SUNSHINE MINING COMPANY, KATHERINE MASON, T. R. MASON, LESTER S. HARRISON, GRACE G. HARRISON, WALTER H. HANSON, EDNA B. HANSON AND F. C. KEANE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENTS

Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson and F. C. Keane.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 99 Federal Reporter (2nd series) 651. (R. 347.) The opinion of the District Court of the United States for the District of Idaho is reported in 19 Federal Supplement 587. (R. 324.) The opinion of the Supreme Court of Idaho is reported in 59 Pacific Reporter (2nd series) 1087. (R. 167.) Petition for Certiorari denied by this Court January 11, 1937, 299 U. S. 615.

JURISDICTION.

Petitioner seeks to have this Court review a decree that has already been before this Court on petition for certiorari, denied January 11, 1937, (299 U. S. 615), the only difference being, so far as these respondents are concerned, that the said petition in the former action sought to invoke the jurisdiction of this Court under Judicial Code, Sec. 237 (b), as amended, (United States Code Annotated, Title 28, Sec. 344 [b]), (Petition of John Pelkes and Evelyn H. Treinies, October Term, 1936, No. 379, page 14), while in the pending action, petitioner, Evelyn Treinies, seeks to invoke the jurisdiction of this Court under Section 240 (a) of Judicial Code as amended, (United States Code Annotated, Title 28, Sec. 347 [a]). (Petitioner's brief, October Term, 1939, No. 4, page 2). *The self same questions were presented in the Petition of John Pelkes and Evelyn H. Treinies in 1936 as are now presented, with the exception of the right of the respondent, Sunshine Mining Company, to avail itself of the protection afforded a stakeholder under the* Federal Interpleader Act, Judicial Code 24(26) as amended (United States Code Annotated, Title 28, Sec. 41, Sub-division 26).

STATEMENT OF THE CASE.

Amelia Pelkes died in 1922. Her surviving spouse, John Pelkes, who was the petitioner's assignor of the stock in litigation, and Katherine Mason, only child by a former marriage, survived her. Her will was admitted to probate in the Superior Court of Spokane County, State of Washington. By the terms of that will one-half of her estate was bequeathed and devised to Mr. Pelkes, the other half to Mrs. Mason. Her entire estate consisted of community property belonging to the marital community composed of herself and her

said husband. In accordance with said will, therefore, three-fourths of the entire community estate would become the property of Mr. Pelkes, one-fourth the property of Mrs. Mason. Both Mr. Pelkes and Mrs. Mason understood and agreed that such will did *not* express the intention of the decedent, that it was the intention that Mr. Pelkes and Mrs. Mason divide equally the entire community estate. (R. 174 and 175.)

On August 9, 1923, final decree of distribution was entered in said court in said estate of Amelia Pelkes, deceased. Said decree distributed said estate in accordance with the terms of said will. Among the assets of said community estate were 30,598 shares of stock of the Sunshine Mining Company and shares of stocks of other mining companies, none of which were inventoried in said estate and none of which had any market value at that time. Said decree contained an omnibus clause distributing all property "now remaining in the hands of said executor and any other property not now known or described which may belong to said estate, or in which the said estate may have any interest * * *." (R. 176.)

Shortly after the death of his wife, Mr. Pelkes moved to the home of the Masons at Kellogg, Idaho, where he resided for several years thereafter. After the entry of said decree of distribution Mr. Pelkes and Mrs. Mason at Kellogg, Idaho, divided equally between them in accordance with Mrs. Pelkes' intention and their agreement the property they then owned in common received from said estate, Mr. Pelkes holding the one-half interest in the certificate for 30,598 shares of Sunshine Mining Company stock and in the other mining companies stock certificates in trust for Mrs. Mason. (R. 177 and 178.)

In accordance with such agreement, Mr. Pelkes and Mrs. Mason each became the owner of 15,299 shares of

said Sunshine stock. Between the time of the entry of said final decree of distribution on August 9, 1923, and November 8, 1933, Mr. Pelkes sold, disposed of and transferred 14,598 shares of the 15,299 shares of said stock so owned by him. There thus remained but 16,000 shares of said stock, 15,299 shares of which Mr. Pelkes held in trust for Mrs. Mason. The wrongful disposition then attempted by Mr. Pelkes of said 16,000 shares of said stock to the petitioner herein, Mrs. Evelyn Treinies, is thus described by the Supreme Court of Idaho:

> "Early in 1931, Pelkes and Mrs. Mason met, in California, appellant Evelyn H. Treinies, a niece of his deceased wife and a cousin of Mrs. Mason. She was at that time about 40 years of age, and he had not seen her since she was a child. During the time the three were together appellant, Treinies, showed great affection for Pelkes, kissed him frequently and made a proposal of marriage to him. She continued her attentions to him until the time of the trial, and took care of him during some of his attacks of illness. November 8, 1933, appellants Pelkes and Treinies, entered into a contract wherein it was agreed he should assign to her 16,000 shares (then market value $3.00 per share) of the capital stock of Sunshine Mining Company (and other income producing property) and, in consideration thereof, she should support, maintain and care for him to the best of her ability during the remainder of his life." (Mr. Pelkes was then 81 years of age.) (R. 178 and 179.) (Words in parentheses ours.)

Following receipt of information in August, 1934, of such transfer of said stock to Mrs. Treinies suit in the State District Court of Idaho was instituted by Mr. and Mrs. Mason to enforce said trust as against said 16,000 shares as to the 15,299 shares thereof belonging to Mrs. Mason. (R. 179.) To such suit Mr. Pelkes and Mrs. Treinies each entered a *general*

appearance and separately filed answers thereto. The Sunshine Mining Company was made a party to said suit and was forthwith upon the commencement of the same enjoined from transferring the stock in question or paying over the dividends accruing thereon until the further order of that Court. (R. 168.)

Thereafter on May 31, 1935, the Superior Court of Spokane County, State of Washington, upon petition of Mr. Pelkes, entered in said probate proceedings of Amelia Pelkes, deceased, its "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor," referred to herein by petitioner as the Washington judgment. Such "Findings and Order" was procured by Mr. Pelkes in violation of a restraining order directed to Mr. Pelkes and Mrs. Mason issued by the State District Court of Idaho in the said trust suit pending therein. (R. 182, 183 and 184.)

Immediately after procuring said "Findings and Order" of May 31, 1935, Mr. Pelkes amended his answer theretofore filed in the pending Idaho State District Court suit and pleaded said "Findings and Order" of the Superior Court of Spokane County, Washington, as a bar to said suit. (R. 182 and 183.)

The Idaho State District Court held such "Findings and Order" as not *res judicata* and on the merits determined the suit partially favorable to the Masons. From such determination of the suit Mr. Pelkes and Mrs. Treinies appealed and the Masons cross-appealed to the Supreme Court of Idaho. The Supreme Court of Idaho held such "Findings and Order" not *res judicata* of such Idaho trust suit and on the merits, on the Masons' cross-appeal, decided wholly favorable to the Masons, awarding them the 15,299 shares of Sunshine stock. (R. 184-192.)

Thereupon Mr. Pelkes and Mrs. Treinies petitioned this Court to grant a writ of certiorari to review the decision of the Supreme Court of Idaho *upon the ground that the Supreme Court of Idaho had failed to give to the alleged judgment* ("Findings and Order") *of the Superior Court of Spokane County, State of Washington, the faith and credit to which it was entitled under* Art. IV, Sec. 1 of the Constitution of the United States. The petition for certiorari was denied by this Court. *John Pelkes and Evelyn H. Treinies, petitioners, v. Katherine Mason and T. R. Mason,* 299 U. S. 615.

On August 12, 1936, Mr. Pelkes and Mrs. Treinies instituted a suit in the Superior Court of Spokane County, Washington, against the Masons, their attorneys and the Sunshine Mining Company, wherein plaintiffs alleged they were the owners of all of said 16,000 shares of Sunshine stock; that the Idaho State Courts had no jurisdiction over them and that they were not bound by said decree of the Idaho State Courts; and prayed that their title to said stock be quieted and the Sunshine Mining Company be compelled to recognize Mrs. Treinies' ownership thereof.

On January 11, 1937, this Court, as heretofore stated, denied the application for a writ of certiorari. On the same day, an order was made by a Judge of the Superior Court of Spokane County, Washington, without notice to any of the defendants named in the Washington case, appointing J. C. Cheney as temporary receiver to take into his possession as such the "undivided interest in the assets of Sunshine Mining Company evidenced by the certificate of stock" originally (November, 1933) issued to Mrs. Treinies and theretofore cancelled on its books by the Sunshine Mining Company in compliance with the decree of the Idaho State Court. Cheney in any capacity never held

any stock certificates, either that stock certificate of Mrs. Treinies which she deposited in the registry of the United States District Court herein or any other stock certificates owned or claimed by any party to any of the litigation. No certificates of stock were ever tendered unto, held by or impounded by any court of the State of Washington or any officer thereof. (R. 312.)

An amended complaint was filed in said Washington suit. The substance of the complaint was that the Idaho State Courts had failed to give full faith and credit to the alleged judgment ("Findings and Order") of the Superior Court of Spokane County, Washington, as required by the provisions of Sec. 1, Art. IV of the Constitution of the United States (the same question which was presented in the Supreme Court of Idaho and in the petition for certiorari to this Court). (R. 258.)

The cause was transferred to the Superior Court of Yakima County, Washington, wherein it was pending upon demurrers to said amended complaint and motions to quash the order appointing Cheney receiver made by the Sunshine Mining Company when this interpleader suit was instituted in the United States District Court for Idaho by the Sunshine Mining Company. (R. 313.)

The adverse claims having been made to the stock and dividends, Sunshine Mining Company instituted the pending interpleader suit.

Upon the institution of this interpleader suit the Sunshine Mining Company deposited in the registry of the District Court cash dividends which it held on the 16,000 shares in controversy, such cash so then deposited being $19,123.75. Just prior to entry of decree it deposited an additional $11,473.25, being cash

dividends accumulated subsequent to the institution of the interpleader suit. (R. 313 and 314.) On May 15, 1937, on motion of Sunshine Mining Company, the District Court entered its order requiring Mrs. Treinies to deposit in the registry of the Court the certificate for 16,000 shares which stood in her name; said order also required the Masons to deposit in the registry of the court the certificates which stood in their names totaling 15,299 shares and $42,225.24 cash received by them from dividends paid thereon; said order also required the Sunshine Mining Company to deposit in the registry of the Court as declared during the pendency of such suit in said Court any further cash dividends. (R. 120-122.)

All of the parties fully complied with said order. Thus before the District Court attempted to determine the issues, the entire subject-matter of this litigation was in the registry of the United States District Court.

While in the pending interpleader suit A. W. Hawkins, Judge of the Superior Court of Yakima County, Washington, and J. C. Cheney, as receiver appointed by such Superior Court, were made parties to the same, no judgment or injunction of any kind or nature was granted by the decree of the United States District Court herein against either said Judge or said receiver. (R. 321-324.)

SUMMARY OF THE ARGUMENT.

I. That the United States District Court had jurisdiction of this interpleader suit.

(1). There is no question but that there were present the necessary diversity of citizenship and amount in controversy to give jurisdiction.

(2). There is no question but that there were present the necessary two or more adverse claimants claiming to be entitled to the property and money in controversy.

(3). The complainant deposited and caused to be deposited the money and property into the registry of that Court there to abide the judgment of that Court.

(4). There was in the registry of that Court the entire subject matter of the litigation and in that Court all the parties claimant before that Court attempted to determine the controversy.

(5). This suit is not an action against a State.

(6). *Asher v. Bone,* 100 Fed. (2d) 315, cited by petitioner, is not authority for petitioner's contention of lack of jurisdiction of the Federal Courts in the present cause.

II. That the judgment entered by direction of the Supreme Court of Idaho is *res judicata* and determinative of this controversy.

(1). The so-called judgment ("Findings and Order") entered by the Superior Court of Spokane County, State of Washington, on May 31, 1935, having been pleaded in bar of the Idaho State Court action, and the Idaho State Courts (District and Supreme) having determined that said Superior Court did not have jurisdiction to make or enter said "Findings and Order," the judgment of the Idaho State Courts thereon, certiorari denied by this Court, is final, conclusive and *res judicata* in so far as the validity of said so-called Washington judgment is concerned, that matter having been put directly in issue in the Idaho State Court suit and the Idaho State Courts hav-

ing had jurisdiction of all of the parties (including petitioner herein) necessary to a determination of the action and also jurisdiction of the cause, the foregoing is true even though the Idaho State Courts erred in determining the jurisdiction of the said Superior Court of Spokane County, State of Washington.

III. That, answering petitioner's argument, although the matter was properly determined as *res judicata,* had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

(1). That the Sunshine stock in question was distributed by the omnibus clause of the decree of distribution entered by said Spokane Superior Court on August 9, 1923.

(2). That the Sunshine stock in question was actually distributed in 1923 by the executor and two sole beneficiaries of the Will of Amelia Pelkes, deceased, the executor was one of said two beneficiaries, after entry of said decree of distribution, which distribution they had a right to make.

(3). That since distribution was made, whether it be viewed that it was made by said omnibus clause or simply actually by the executor and sole beneficiaries, the "Findings and Order" entered by said Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a differ-

ent distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes and Mrs. Mason therein founded upon the contract admittedly made by those two in Idaho after August 9, 1923.

(4). That the jurisdiction of the Spokane Superior Court sitting in probate to decide who was the owner of the stock in question was not sustained by the Supreme Court of Washington in this case, as the denial of a writ of prohibition without opinion by that Court is not "equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues. * * *"

(5). That the United States District Court, although holding that the judgment entered by direction of the Supreme Court of Idaho was *res judicata* of the pending controversy, made an examination of the decisions and statutes of the State of Washington and came to the conclusion that the Spokane Superior Court sitting in probate, had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry of the decree of distribution by said Superior Court.

ARGUMENT.

As indicated in the foregoing Summary these respondents will support the following three propositions which they believe completely determine the cause in their favor:

I. That the United States District Court had jurisdiction of this interpleader suit.

II. That the judgment entered by direction of the Supreme Court of Idaho is *res judicata* and determinative of this controversy.

III. That, answering petitioner's argument, although the matter was properly determined as *res judicata,* had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

We shall discuss such three propositions in the order stated.

I.

That the United States District Court had jurisdiction of this interpleader suit.

(1). There is no question but that there were present the necessary diversity of citizenship and amount in controversy to give jurisdiction.

(2). Nor is there any question but that there were present the necessary two or more adverse claimants claiming to be entitled to the property and money in controversy.

(3). Upon the institution of this interpleader suit respondent Sunshine Mining Company deposited in the registry of the District Court cash dividends which it held on the 16,000 shares in controversy, such cash so then deposited being $19,123.75. During the pendency of this suit in the District Court said respondent deposited as declared further cash dividends. (R. 313 and 314.) In compliance with order entered by the District

Court upon motion of respondent Sunshine Mining Company on May 15, 1937, Mrs. Treinies, petitioner herein, deposited in the registry of the Court the certificate for 16,000 shares which she had theretofore always held since issuance and which stood in her name, and in compliance with said order the Masons likewise deposited certificates which stood in their names totaling 15,299 shares and $42,225.24 cash received by them from dividends paid to them thereon. (R. 120-122.)

No cash, dividends or certificates of stock involved in this litigation were ever tendered into, held by or impounded by any Court of the State of Washington or any officer thereof. (R. 312.)

(4). Thus prior to the time the United States District Court attempted to determine the issues herein, the entire subject-matter of this litigation was in the registry of that Court, and all parties claiming any interest in such subject-matter were before that Court.

(5). This suit is not an action against a State. It is true that in this interpleader suit A. W. Hawkins, former Judge of the Superior Court of Yakima County, Washington, and J. C. Cheney, as receiver appointed by such Superior Court, were made parties to the same. It is clear, however, from the record herein that the real parties in interest in this suit were solely on the one hand Mrs. Treinies, the petitioner herein, and the Masons on the other hand, they were the claimants on the respective sides of the stock certificates of the Sunshine Mining Company and cash dividends declared thereon which are the subject-matter of this litigation. Therefore, none of the other parties named as defendants in the bill of interpleader were necessary parties to the determination of this controversy.

The decree of the United States District Court herein, affirmed by the Circuit Court of Appeals, *grants no judgment or injunction of any kind or nature against either said Judge or said receiver.* (R. 321-324.) No party named in said bill of interpleader seeks in this Court relief from the judgments of the lower Courts except the petitioner, Mrs. Treinies.

It cannot, therefore, with any semblance of substance, be contended that there is now before this Court any judgment "to compel or restrain state action" or "nominally against individuals but restraining or otherwise affecting their action as State officers," so as to make the judgment herein violative of the Eleventh Amendment and come under the ban announced by Mr. Justice Stone in the case of *Worcester County Trust Company v. Riley,* 302 U. S. 292.

That said case last mentioned, although it is strongly relied upon by petitioner, has no application to the facts in this case. In that case the petitioner prayed

> "That the Court order respondent officials of the two States to interplead their respective claims for the tax; * * *"

The right to tax is the most vital power possessed by a State. Its existence depends thereon. The tax officers in that case were clearly representing the States in question and were not representing private individuals or private rights.

The instant case is essentially a private litigation and no proprietary interest of the State of Washington has been interferred with. Neither the Attorney General of the State of Washington nor any other State officer is here registering any complaint. The petitioner herein is not authorized nor empowered to speak for the State of Washington.

"* * * The immunity from suit belonging to a State, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege * * *."

Clark v. Barnard, 108 U. S. 436.
Gunter v. Atlantic Coast Line Railroad Co., 200 U. S. 273.

Immunity from suit, therefore, is a personal privilege which may be demanded by a sovereign. It is not a public right which may be insisted upon by a private individual. We submit that the State of Washington is not a party hereto and has no concern in this litigation.

(6). *Asher v. Bone*, 100 Fed. (2d) 315, cited by petitioner, is not authority for petitioner's contention of lack of jurisdiction of the Federal Courts in the present cause.

Petitioner discusses said case in this regard on pages 28 and 29 of her brief, citing only the following statement of elementary probate law therefrom:

"The jurisdiction to determine the interest of respective claimants on an estate in Idaho is exclusively in the probate courts of that State having jurisdiction of the proceedings and the determination thereof by such probate court, whether right or wrong, is conclusive and subject only to be reversed, set aside or modified on appeal."

After some discussion petitioner on page 29 of her brief concludes:

"By the same token, and on the authority of *Asher v. Bone*, supra, and other cases here cited, it (United States District Court) had no jurisdiction to reverse the Washington State Courts." (Words in parenthesis ours.)

The United States District Court herein did not "reverse the Washington State Courts." It merely held that the so-called Washington judgment ("Findings and Order") having been pleaded as a defense in bar of the Idaho State court action and such plea of *res judicata* having been denied by the Idaho State Courts, that such judgment of the Idaho State Courts having become final the same was conclusive as between the parties thereto, which includes the petitioner herein, and could not be relitigated in the present interpleader suit.

To resume with the decision of *Asher v. Bone*, immediately following the portion of the opinion therein set forth on page 28 of petitioner's brief and above quoted herein is the following:

> "A court of equity cannot invalidate or modify the probate court's decree of distribution. It can, however, declare that the fraudulent recipients of the property of the estate hold the proceeds in trust for those who have been defrauded by their extrinsic fraud."
>
> *Asher v. Bone*, 100 Fed. (2d) 315, 317.

The Court concludes its opinion on page 319 of said citation with the following:

> "We conclude that there was no showing of extrinsic fraud sufficient to justify this court in declaring a trust in the property of the estate in the hands of the distributees."

So this case of *Asher v. Bone* decides nothing pertinent to the inquiry here.

From the foregoing these respondents submit that the United States District Court had jurisdiction of this interpleader suit.

II.

That the judgment entered by direction of the Supreme Court of Idaho is res judicata and determinative of this controversy.

(1). The so-called judgment ("Findings and Order") entered by the Superior Court of Spokane County, State of Washington, on May 31, 1935, having been pleaded in bar of the Idaho State Court action, and the Idaho State Courts (District and Supreme) having determined that said Superior Court did not have jurisdiction to make or enter said "Findings and Order," the judgment of the Idaho State Courts thereon, certiorari denied by this Court, is final, conclusive and *res judicata* in so far as the validity of said so-called Washington judgment is concerned, that matter having been put directly in issue in the Idaho State Court suit and the Idaho State Courts having had jurisdiction of all the parties (including petitioner herein) necessary to a determination of the action and also jurisdiction of the cause, the foregoing is true even though the Idaho State Courts erred in determining the jurisdiction of the said Superior Court of Spokane County, State of Washington.

It must be constantly kept in mind that the Idaho State Courts are the only courts other than the Federal Courts which have had jurisdiction of all the parties interested in this litigation. That all the parties appeared generally in the Idaho State Courts and presented their evidence. That the Idaho State Courts had at all times jurisdiction of the subject-matter of this action, all the issues referred to by the United States District Court and the Circuit Court of Appeals had been definitely settled as to all parties in the Idaho

State Courts. That the so-called Washington judgment had been pleaded as a bar to the Idaho State Court action. That the petitioner and her predecessor in interest in said stock, Mr. Pelkes, considering themselves aggrieved by the determination of said action in the Supreme Court of Idaho, petitioned this Court for a writ of certiorari to review the same. That such writ was denied by this Court.

The necessary facts and applicable law as to this are well stated by the United States Circuit Court of Appeals in its opinion herein as follows:

> "On May 31, 1935, while the Idaho suit was pending, the Washington Court rendered a judgment to the effect that Pelkes was the owner of the stock and dividends in question, and that the Masons had no right, title or interest therein. In the interpleader suit, appellants pleaded the Washington judgment and alleged that the Idaho Court was thereby divested of whatever jurisdiction it might otherwise have had of the Idaho suit. The Masons denied this and asserted that the Washington judgment was itself void for want of jurisdiction. That issue—as to whether the Washington Court had jurisdiction to render the judgment relied on by appellants—had also been raised in the Idaho suit. The Idaho Court was empowered to determine that issue *(Pendleton v. Russell*, 144 U. S. 640, 644) and did determine it in favor of the Masons, holding the Washington judgment void for want of jurisdiction. The issue thus determined could not be relitigated in the interpleader suit.
>
> "Whether the issues determined by the Idaho decree were rightly or wrongly determined, is no longer open to inquiry. Having been rendered by a court which had jurisdiction to render it, and having long since become final, that decree, even though erroneous, is valid and conclusive on the

> parties thereto and all persons claiming under them. *Roche v. McDonald,* 275 U. S. 449, 454." (R. 352.)

In the Idaho State Court action, as stated by the Circuit Court of Appeals, the Judgment ("Findings and Order") of the Spokane Superior Court was pleaded in bar. The Idaho State Courts overruled that plea. The judgment of the Idaho State Courts then was *res judicata* as to that and "the issue thus determined could not be relitigated in the interpleader suit." That doctrine is clearly stated in *Cromwell v. County of Sac,* 94 U. S. 351:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *"

As stated by the Circuit Court of Appeals, whether the Idaho State Courts determined rightly or wrongly that the Spokane Superior Court did not have jurisdiction to make its "Findings and Order" of May 31, 1935, so far as the same attempted to affect the contract made in Idaho between the beneficiaries, Mr. Pelkes and Mrs. Mason, is no longer open to inquiry. The law as to that is stated in the following language in *Roche v. McDonald,* 275 U. S. 449, 454 and 455:

"* * * The court of Oregon had jurisdiction of the parties and of the subject-matter of the suit. Its judgment was valid and conclusive in that state. The objection made to enforcement of that judgment in Washington is, in substance, that it must there be denied validity because it contravenes the Washington statute and would have been void if rendered in a court of Washington; that is, in effect, that it was based upon an error of law. It cannot be impeached upon that ground. If McDonald desired to rely upon the Washington statute as a protection from any judgment that would extend the force of the Washington judgment beyond six years from its rendition, he should have set up that statute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, *he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive between the parties in that State, was equally conclusive in the courts of Washington, and under the full faith and credit clause should have been enforced by them.*" (Italics ours.)

The judgment entered by direction of the Supreme Court of Idaho, petition for certiorari thereon denied by this Court, is valid, final and conclusive. Even if the Idaho Court had misapprehended the Washington law, its judgment became final and conclusive in Idaho and was and is equally conclusive on the courts of Washington and the Federal courts.

III.

That, answering petitioner's argument, although the matter was properly determined as res judicata, had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would

have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

(1). That the Sunshine stock in question was distributed by the omnibus clause of the decree of distribution entered by said Spokane Superior Court on August 9, 1923.

Said decree of distribution after referring to the property therein described, included and distributed "any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest," such provision is commonly known as as omnibus clause.

Such an omnibus provision is valid to pass title to property owned by an estate although omitted from the particular description.

Smith v. Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314;

Humphry v. Protestant Episcopal Church, 154 Cal. 170, 97 Pac. 187;

Heydenfeldt v. Osmont, 178 Cal. 768, 175 Pac. 1.

In *Humphry v. Protestant Episcopal Church,* supra, such a clause was held to pass title to an interest in real estate; and in *Heydenfeldt v. Osmont,* supra, to pass title to land omitted from a particular description. The last case was one where the decree of distribution was made under a compromise agreement. The Court further held that it represented a contemporaneous interpretation between the parties.

In *Bancroft's Probate Practice,* Sec. 1128, referring to the description of the property in a decree of distribution, that author states:

"It is customary to conclude the decree with an 'omnibus' clause to guard against omissions and failures in specific description. Under such a clause the whole of the residue, whether described or undescribed, known or unknown, may be distributed. Against collateral attack such a clause is sufficient to include land not mentioned, but shown by the evidence to have belonged to the decedent at the date of his death."

(2). That the Sunshine stock in question was actually distributed in 1923 by the executor and the two sole beneficiaries of the Will of Amelia Pelkes, deceased, the executor was one of said two beneficiaries, after entry of said decree of distribution, which distribution they had a right to make. (R. 188, 177 and 178.)

Under the law of the State of Washington no formal probate proceedings in court are necessary for the settlement of an estate.

In re Lambrecht's Estate, 112 Wash. 645, 192 Pac. 1018.

As a matter of fact Mr. Pelkes had between the time of entry of the decree of distribution, August 9, 1923, and November 8, 1933, sold, transferred and disposed of all of said 30,598 shares of Sunshine stock originally belonging to the marital community composed of John Pelkes and Amelia Pelkes, deceased, husband and wife.

(3). That since distribution was made, whether it be viewed that it was made by said omnibus clause or simply actually by the executor and sole beneficiaries, the "Findings and Order" entered by said Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a different distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes

and Mrs. Mason therein founded upon the contract admittedly made by those two in Idaho after August 9, 1923.

The Supreme Court of the State of Washington has never relaxed the rule as to the finality of a decree of distribution. In the late case of *Reagh v. Dickey,* 183 Wash. 564, 48 Pac. (2d) 941, 945, decided in 1935, that Court said:

> "It certainly should be deemed thoroughly well settled by this time that a decree of distribution, such as that above referred to, is a final decree, as much so as a decree in any other proceeding in a court of equity, or any other court in this State."

Again in 1937 in the case of *O'Leary v. Bennett,* 190 Wash. 115, 66 Pac. (2d) 875, 878, that Court said:

> "It is true the decree does not create the title in the distributees, but it is a solemn adjudication of who acquired the title of the deceased, and if rendered upon due process of law, is final and conclusive upon that question."

It must be remembered that the decree of distribution in the estate of Amelia Pelkes was entered by the Superior Court of Spokane County in the year 1923; that no appeal was taken therefrom and no attempt ever made to set aside the same. An action to accomplish the latter under the statutes of Washington could in any event not have been instituted more than one year after the entry of the decree of distribution.

After decree of distribution the Superior Court of Spokane County lost jurisdiction of the property distributed except to enforce the distribution decreed, and any subsequent order of that Court, "directing a different disposition to be made of a portion of the

property, was without authority, and consequently void." Such is the holding of the Supreme Court of Washington in the case of *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231, 232, wherein that Court says:

> "The effect of such a decree (decree of distribution) is to vest the absolute right and title to the property in the distributees, and, therefore, the subsequent order of the Court, directing a different disposition to be made of a portion of the property was without authority and consequently void." (Words in parenthesis ours.)

In the late Washington case (1937) of *In re Cogswell's Estate,* 189 Wash. 433, 65 P. (2d) 1082, *after decree of distribution entered* certain beneficiaries of the estate petitioned in the probate proceedings,

> "seeking a construction of the will and a decree of distribution in accordance therewith, * * * and citing the respondent (executrix) to appear and show cause why the petition should not be granted. The respondent appeared specially and challenged the jurisdiction of the court. The trial court held that it had no jurisdiction, and the citation was ordered quashed." (Word in parenthesis ours.)

The Supreme Court of Washington states:

> *"The trial court held that, since the estate of Myron J. Cogswell had been closed by final decree* (decree of distribution), *it had no jurisdiction to issue citations therein. This rule is sound; such a citation would have no foundation."* (Words in parenthesis and italics ours.)

The so-called Washington judgment on which the petitioner here relies, being that instrument dated May 31, 1935, entered by the Superior Court of Spokane County, entitled "Findings and Order Approving Partition, Correcting Receipts for Distributive

Shares, and Discharging Executor," was entered as the record herein shows on citation issued by said Superior Court more than eleven years after decree of distribution entered in said estate. It comes therefore clearly under the ban of the last cited as well as the other cases herein and by Judge Cavanah of the United States District Court cited from the Supreme Court of Washington.

Petitioner cites *In re Dyer's Estate*, 161 Wash. 498, 297 Pac. 196, as applicable to the situation here presented. The fundamental difference between that case and the instant one is that in the former the executor did not inventory or distribute the stock in question claiming the same as his separate property in which the estate had no interest, while in the instant case all parties admit that while not inventoried the stock in question was part of the estate, and it was actually distributed both by the omnibus clause of the decree and by Mr. Pelkes as executor in 1923. Mr. Pelkes after the time of the decree of distribution in 1923 actually sold part of the stock that belonged to him by virtue of such distribution. In fact the record shows that on May 31, 1935, when he secured an ex parte so-called judgment of the Superior Court of that date he had *distributed, sold and disposed of* all of the stock; that under no conceivable theory could it be said that he as executor or individually had, held or owned any of the stock upon which the so-called judgment could act.

Petitioner cites *State ex rel. Reser v. Superior Court*, 13 Wash. 25, 42 Pac. 630, as applicable to the situation here presented. That case has no application here, it merely deals with the right of an executor or administrator to discharge upon showing that he has made the distribution decreed by the decree of distribution. The Court in that case merely decided that:

> "* * * Upon the filing of such purported receipts (of heirs), and an application for a final discharge, the court should direct a hearing, and a final order (of discharge) should be granted only upon a satisfactory showing to the court that the estate had in fact been fully distributed, * * * ." (Words in parentheses ours.)

(4). That the jurisdiction of the Spokane Superior Court sitting in probate to decide who was the owner of the stock in question was not sustained by the Supreme Court of Washington in this case, as the denial of a writ of prohibition without opinion by that Court is not "equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues * * *."

On page 24 of her brief the petitioner states that the jurisdiction of the Spokane Superior Court "to decide who was owner of the stock in question was sustained by the Supreme Court of Washington in this specific case."

Petitioner cites solely as authority for such statement an answer filed in this interpleader suit by Judge Hawkins of the Superior Court of Yakima County, Washington. Judge Hawkins in such answer says:

> "Under the laws of the State of Washington, the denial of these applications for writs of prohibition by the Supreme Court of this State (Washington) was equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues raised by the petition of Katherine Mason and the return of John Pelkes above referred to." (Word in parenthesis ours.)

Why Judge Hawkins made such a statement in his answer counsel does not know, but such is *not* the law of the State of Washington. The denial of a writ of

prohibition without opinion, as was true of the writs referred to by Judge Hawkins, is not a determination that the lower court has jurisdiction. The applicable statute is:

> "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. * * *"
>
> *Rem. Rev. Stat.*, Sec. 1015.

In accordance with said statute, therefore, two conditions must be present in order for a writ of prohibition to issue, namely, (1) lack of jurisdiction in the inferior tribunal and (2) lack of a plain, speedy and adequate remedy by appeal or otherwise in the ordinary course of law.

> "We have so frequently held that a writ of prohibition will issue *only* where the trial court is threatening to proceed when he has no jurisdiction so to do, *and where there is no plain, speedy and adequate remedy by appeal or otherwise,* that we deem it unnecessary to cite cases." (Italics ours.)
>
> *State ex rel. Chin v. Superior Court,* 139 Wash. 449, 247 Pac. 738.

Thus, under the Washington law there is nothing to the contention that the Supreme Court of Washington by denying writs of prohibition ever decided that the Spokane Superior Court had jurisdiction to hear and decide the issues raised by the petition and return thereto in the matter of the Estate of Amelia Pelkes, deceased.

> (5). That the United States District Court, although holding that the judgment entered by direction of the Supreme Court of Idaho was *res judicata* of the pending controversy, made an ex-

amination of the decisions and statutes of the State of Washington and came to the conclusion that the Spokane Superior Court sitting in probate, had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry of the decree of distribution by said Superior Court.

Judge Cavanah of the United States District Court in his opinion herein, says as to that:

"Under the laws of Washington, the Superior Court for Spokane County, sitting in probate, had jurisdiction and power to probate the estate of Amelia Pelkes under her will and render a decree of distribution of property then inventoried and unknown property of which she may have been possessed and when such decree was rendered, title was vested in the beneficiaries under the will: Remington's Revised Statutes of Washington, Sections 1371 and 1533. The effect of that decree and the interval between its entry and the final discharge of the executor is stressed by Evelyn Treinies and the administrator of the estate of John Pelkes as continuing the exclusive jurisdiction and power in the Superior Court of Washington, to decree and dispose of the shares of stock here involved. The decree of distribution of the personal property was a comprehensive and final one under the laws of Washington and if not appealed from cannot be collaterally attacked: *Alaska Banking and Safe Deposit Company v. Noyes et al.*, 117 Pac. 492; *Parr v. Davidson et al.*, 262 Pac. 959, and being so, the executor pursuant to that decree delivered the whole of the property of the estate to the beneficiaries, which passed out of the custody of the Superior Court of Washington. Nothing else was required of the executor to have been done, except to make final account to the court in which he was to report that he had

complied with the decree of distribution and delivered to the heirs the property decreed to them. No further order or confirmation of the court was required to have been made as to the shares of stock here involved, except the court may, *when a hearing is had for a distribution,* partition, among the persons entitled thereto, the estate held in common and undivided, and designate and distribute their respective shares to the end that the estate may be administered and distributed to those entitled thereto. Remington's Revised Statutes of Washington, Section 1533. Under such circumstances the jurisdiction of the probate court was closed as to the shares of stock here involved, after the heirs had made amicable division of their own property as no controversy then existed to which jurisdiction of the probate court could attach. The parties' interests in these shares of stock could be definitely, mathematically determined under the decree of distribution, as the decree gives to them a definite interest in the property which could be determined and partitioned by them, *as was done,* and the executor, when in dealing with the number of shares of stock, determined mathematically a definite number of shares to be delivered to the heirs, and therefore it would not have required a petition for partition to be filed with the court, after the final decree of distribution was made. The laws of the State of Washington provide that, after decree of distribution was rendered on August 9, 1923, the parties must move within the time required by the laws of Washington, if there is any dispute between them questioning the decree of distribution; Remington's Revised Statutes of Washington, Section 466, and the effect of such a decree of distribution, as said by the Supreme Court of Washington, is that 'it has all the force, effect, and finality of any other final judgment rendered by a Superior Court.' *In re Doane's Estate,* 116 Pac. 847, 849.

The Supreme Court of that State disposed of the theory as to the Superior Court sitting in pro-

> bate continuing jurisdiction to adjudicate property of an estate after it was decreed in a decree of distribution, in the case of *In re Thompson's Estate*, 188 Pac. 784, 785, where it was held that after an heir had disposed of her interest in the estate she no longer could have a legal interest in the probate matter, and the probate court was not entitled to in any way consider it." (Italics ours.) (R. 332 and 333.)

Clearly from the foregoing it can only be concluded that the "Findings and Order" entered by the Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a different distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes and Mrs. Mason therein founded upon the contract admittedly made by those two persons in Idaho after August 9, 1923.

The United States District Court herein (R. 336 and 337) quoted the following appropriate statement from the opinion of Mr. Justice Roberts in the case of *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522, 525 and 526:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

These respondents submit that the decision of the

Circuit Court of Appeals affirming the decision of the United States District Court should be affirmed.

Respectfully submitted,

RICHARD S. MUNTER,

LESTER S. HARRISON,

Counsel for Respondents Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson and F. C. Keane.

FRANK GRIFFIN,
Of Counsel.